No. 82-945

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

SURE-TAN, INC., and SURAK LEATHER COMPANY
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF AMICUS CURIAE ON BEHALF OF THE CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION

MARY K. GILLESPIE
PEARL, MCNEILL, GILLESPIE
& STANDISH
1419 Broadway, Suite 501
Oakland, CA 94612
Telephone: (415) 864-3405
Counsel for Amicus Curiae

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

The California Rural Legal Assistance Foundation hereby moves this Court for leave to file the attached brief as amicus curiae in support of the position of Respondent National Labor Relations Board. Respondent has, through counsel, consented to the filing of this brief but Petitioners Sure-Tan, Inc. and Surak Leather Company have declined to consent to the filing.

The California Rural Legal Assistance Foundation, headquartered in Sacramento, California, was established in 1982. Many members of its governing body were formerly employed by or otherwise associated with California Rural Legal Assistance, Inc., which has provided legal services to farmworkers and other poor people throughout rural California since 1966. However, amicus California Rural Legal Assistance Foundation is a separate and distinct organization.

The Foundation's principal purposes

are to provide legal services, counseling and representation to migrant and seasonal farmworkers, rural Chicanos and other ethnic minorities and low income rural persons in California. Many of its constituents are now or were in the past undocumented aliens, primarily from Mexico. Many of these undocumented aliens have resided in California for years, and have citizen children. Most are employed, as fieldworkers in agriculture, in canneries and other food processing plants, and in the service industry, primarily in small restaurants. Most work alongside legally present workers. Those California Rural Legal Assistance Foundation (C.R.L.A.F.) constituents who work in the larger food processing plants and many who work in agriculture are unionized, but other workers are not, or are in the process of organizing.

Proposed amicus represents the undocumented and documented alien and

non-alien workers who will be affected by the Court's decision in this case, and thus presents a perspective different from that of the employer or the National Labor Relations Board. In addition, many constituents of prospective amicus were or represented farmworkers prior to passage of the California Agricultural Labor Relations Act, California Labor Code Section 1140, et seq. (ALRA), when labor relations were essentially unregulated in the agricultural sector. Amicus does not believe that such a state of affairs is beneficial to its constituents, and is concerned that, if the position of the employer is adopted, undocumented workers would essentially be excluded from the protections of the National Labor Relations Act, 29 U.S.C. Section 151 et seq. (NLRA), and possibly from the ALRA, leading to a return to deregulation for large sectors of the rural workforce.

Finally, amicus has had substantial

experience advocating for the needs of non-English speaking persons, and is currently supporting bills in the California legislature which would require Spanish language services by various state agencies.

For these reasons, the California Rural Legal Assistance Foundation moves that the Court grant it permission to file a brief amicus curiae.

Respectfully submitted,

MARY K. GILLESPIE
Attorney for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Statutes

United States

Page

Page

NO. 82-945

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

SURE-TAN, INC., AND SURAK LEATHER COMPANY,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF AMICUS CURIAE ON BEHALF OF THE CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION

INTERESTS OF AMICUS CURIAE

The interests of amicus curiae California Rural Legal Assistance Foundation are set forth in the accompanying motion for leave to file this brief.

SUMMARY OF ARGUMENT

Amicus submits that the remedial issues in this case, though by no means simple, can be decided according to principles long established and applied in other unfair labor practice proceedings. Amicus is confident that this Court will resist the Petitioner Employer's attempt to evade responsibility for its unfair labor practices by invoking the "bogeyman" of the supposed illegal alien menace and will decide the issue on its merits as it did in Plyler v. Doe, 457 U.S. 202 (1982).

Amicus has discussed only the remedial

issues herein because those are within its expertise and because the issue of whether the Petitioner committed an unfair labor practice has been briefed thoroughly by the Board and other amici. With regard to the remedial issues, amicus contends that the Board properly ordered reinstatement and back pay, without regard to the wrongfully discharged workers' immigration status. However, the specific amount of back pay and other availability issues c n best be determined in compliance proceedings.

Both reinstatement and back pay are important remedies under the NLRA, and should not be denied except in the most exceptional cases. This case, or any other case where wrongfully discharged workers are undocumented, is not such an exceptional case. An award of reinstatement and back pay would not impinge on the immigration laws, but would rather further the purposes of those laws, insofar as such awards would

deter unscrupulous employers from employing and exploiting undocumented aliens. If reinstatement and back pay are not ordered, the wrongdoing Employer will receive a windfall, the innocent workers will not be made whole, and the loophole in the immigration laws which permits employers to hire undocumented workers without liability will be extended to the NLRA.

The discriminatees' back pay should not be tolled while they are available for and seeking work, whether here or in Mexico. Alternatively, even if the discriminatees are considered unavailable while in Mexico, they should be awarded back pay nonetheless. Such an award is necessary to return them to the status quo and to prevent the Employer from profiting from its actions in rendering them unavailable.

Finally, the ruling as to the contents of the reinstatement offer was well within the court's discretion and is correct.

ARGUMENT

I. REINSTATEMENT OF UNDOCUMENTED WORKERS IS A PROPER REMEDY UNDER THE NLRA AND DOES NOT CONFLICT WITH THE INA.

A. Reinstatement of Wrongfully Discharged Workers is Necessary to Effectuate the Purposes of the NLRA.

The National Labor Relations Board[1] is specifically authorized by Congress to order reinstatement of employees who have been the victims of unfair labor practices by their employer.[2] As this Court has noted, "Reinstatement is the conventional correction for discriminatory discharges." Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 187 (1941) "[W]ithout such a remedy

---

1/ Respondent National Labor Relations Board will be referred to herein as "the NLRB" or "the Board." Petitioners Sure-Tan, Inc. and Surak Leather Company will be referred to jointly as "the Employer." The employees whom the Board found to be the victims of the unfair labor practice will be referred to as "undocumented," consistent with this Court's terminology in Plyler v. Doe, 457 U.S. 202 (1982).

2/ Section 10(c), 29 U.S.C. Section 160(c).

industrial peace might be endangered because workers would be resentful of their inability to return to jobs to which they may have been attached and from which they were wrongfully discharged." Ibid., 313 U.S. 177, 195. Great deference is given to the Board's remedial orders by the courts, which generally do not disturb such orders on review unless they could not reasonably be said to effectuate the purposes of the National Labor Relations Act.[3/] Shepard v. NLRB, ___U.S.___, 103 S.Ct. 665 (1983). This Court has even approved a Board reinstatement order which required an employer to resume operations which had been subcontracted out. Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 215-217 (1964).

The Board has consistently ordered reinstatement of wrongfully discharged workers, without regard to their immigration

---

3/ 29 U.S.C. Section 151, et seq., hereinafter "the NLRA" or "the Act."

status. See, e.g., Amays Bakery & Noodle Corporation, Inc., 227 N.L.R.B. 214 (1976). The propriety of such a reinstatement order has been upheld by the Ninth Circuit. NLRB v. Apollo Tire Co., 604 F.2d 1180, 1182-84 (9th Cir. 1979). The Board originally issued such a general reinstatement order in this case,[4] leaving the details to be worked out in a compliance proceeding in accord with its usual practice.[5] The Seventh Circuit modified the order so as to require reinstatement only as to discriminatees who are legally in the country and authorized to work, although it indicated that such a result was not compelled by the immigration laws.[6] This modification of

4/ 234 N.L.R.B. 1187 (1978); 246 N.L.R.B. 788 (1979) (denying General Counsel's Motion for Reconsideration).

5/ Coca-Cola Bottling Company of Louisville, 108 N.L.R.B. 490, 492-94 (1954); NLRB Case Handling Manual Sec. 10504. This Court has endorsed that procedure. Nathanson v. NLRB, 344 U.S. 25, 29-30 (1952).

6/ NLRB v. Sure-Tan, Inc., 672 F.2d 592, 605-06 (7th Cir. 1982).

the Board's order was outside the Court of Appeals' limited jurisdiction to review Board orders, and proposed amicus submits that the original Board order more nearly complies with the purposes of the NLRA.[7/]

As recognized by the Seventh Circuit, Board reinstatement orders are generally upheld unless there is a showing of employee misconduct which relates to the employee's ability to perform his work duties or to compatibility between employee and employer, 672 F.2d 592, 604, factors not present in this case. A failure to order reinstatement would leave the undocumented employees less than whole, thus deterring those workers

---

7/ Although the Board did not file a Cross-Petition for Certiorari, this Court can review the propriety of the Seventh Circuit's modification of the reinstatement order under the "plain error" doctrine, Supreme Court Rule of Practice 40(1)(d)(2). The issue of the propriety of any reinstatement order has been touched upon by the Employer in its brief (Pet. Brief 19-20, 22) and briefed by several proposed amici. Cf. Procunier v. Navarette, 434 U.S. 555, 559, n. 6 (1978).

and other nonalien employees from exercising their rights under the Act in the future. It would also have the effect of making it virtually impossible for unions to organize a bargaining unit of undocumented and documented workers, as the undocumented would be afraid to sign authorization cards lest they be discharged without remedy. Moreover, even if they overcame that fear, they could be discharged after the union is certified as happened in this case, thus undermining the bargaining unit during the crucial initial year.[8/] For these reasons, denial of unconditional reinstatement was proper only if necessary to avoid subverting other equally important federal policies, in this case those embodied in the

---

8/ NLRB v. Sure-Tan, Inc. (Sure-Tan I), 583 F.2d 355, 361 (1978). The problem is analogous to that which existed under the NLRA before the 1959 amendments when strikers not entitled to reinstatement were not permitted to vote in a representation election. See, Bio-Science Laboratories v. NLRB, 542 F.2d 505, 507-08 (9th Cir. 1976).

Immigration and Nationality Act (INA), 8 U.S.C. Section 1101 et seq.

B. Reinstatement of Undocumented Workers Is Not Inconsistent With National Immigration Policy.

1. It Is Not a Crime To Work in The United States Without a Work Authorization, or to Employ Such Workers.

Despite the criticisms of judges[9] and commentators,[10] the so-called "Texas Proviso" to the INA, 8 U.S.C. Section 1342(a), exempts employers from penalties for employing undocumented aliens. Congress has repeatedly failed to enact employer

9/ Plyler v. Doe, supra, 457 U.S. 202, 218; 240 (Powell, J., concurring); U.S. v. Acosta de Evans, 531 F.2d 428, 430 (9th Cir. 1976); Herrera v. U.S., 208 F.2d 215, 218 (Pope, J., concurring) (9th Cir. 1953), cert. denied 347 U.S. 927 (1954).

10/ See, e.g., Comment: "Employer Sanctions: The 'New Solution' to the Illegal Alien Problem," 1979 Ariz. St. L.J. 439; Goodpaster: "Illegal Immigration," 1981 Ariz. St. L.J. 651; Fogel: "Illegal Aliens: Economic Aspects & Public Policy Alternatives," 15 San Diego L.Rev. 63 (1977); "Developments in the Law: Immigration Policy & the Rights of Aliens," 96 Harv.L.Rev. 1286, 1440 (1983).

sanctions legislation,[11] though such legislation has passed the Senate and is awaiting action on the floor of the House in the current session.[12] Unless it passes, Sure-Tan may continue to employ undocumented workers with impunity.

Nor is there any requirement that all alien workers possess labor certificates under 8 U.S.C. Sec. 1182(a)(4). The vast majority of immigrants are admitted because they are related to U.S. citizens or resident aliens, not because they have needed skills as evidenced by possession of a labor certificate.[13]

11/ The historical fate of proposed employer sanctions legislation is discussed in Comment: "Employer Sanctions," supra, n. 10; Developments, supra, n. 10, 96 Harv.L.Rev. 1286, 1435, n. 7; Lopez: "Undocumented Mexican Migration: In Search of a Just Immigration Law & Policy," 28 U.C.L.A. L.Rev. 615, 672 (1983).

12/ Immigration Reform and Control Act of 1983, S.529, H.R. 1510 (98th Cong.).

13/ It has been estimated that only 10% of

(footnote continued)

2. Reinstatement of Wrongfully Discharged Workers is Consistent With and Furthers the Goals of the INA.

The Employer avers that the objectives of the immigration laws "are clear--to protect American workers from an influx of foreign labor by imposing criminal sanctions on those who violate federal immigration laws." Pet. Brief at 23. The matter is far more complex.

First, as discussed supra,[14/] a labor certification is required of only a very small percentage of immigrants. Most are admitted in furtherance of other goals,

Footnote 13/ continued

entering immigrants possess a labor certificate although 52% enter the labor market shortly after arrival. Fragomen & Del Rey: "The Immigration Selection System--A Proposal for Reform," 17 San Diego L.Rev. 1, 22-23 (1979), and that the process affects 1/13th of workers annually. Manulkin & Maghame: "A Proposed Solution to the Problem of the Mexican Alien Worker," 13 San Diego L.Rev. 42, 51 (1975). The Chair of the House Judiciary Committee has cited similar figures. Rodino: "The Impact of Immigration on the American Labor Market," 27 Rutgers L.Rev. 245, 266-270 (1974).

14/ Pp. 10 - 11 , n. 13.

e.g., family reunification. Second, the labor certification requirement was enacted in part to limit immigration and to increase the quality of immigrants.[15/] Third, as discussed infra, the goal of the labor certification process is more accurately phrased as protection of decent wages and working conditions for the domestic work force than as protection of individual domestic workers. And finally, there is virtually unanimous agreement that the labor certification process serves no valid purpose and should be abolished.[16/]

Insofar as a goal of the INA is protection of the American economy from "adverse working standards as a consequence of

---

15/ O'Reirman v. Regional Manpower Administrator, 336 F.Supp. 467, 471 (S.D.N.Y. 1971); Rodino, supra, n. 13, 27 Rutgers L.Rev. 245, 255.

16/ Rodino, supra, n. 13, 27 Rutgers L.Rev. 245, 272; Manulkin & Maghame, supra, n. 13, 13 San Diego L.Rev. 42, 43; Gordon: "The Need to Modernize Our Immigration Laws," 13 San Diego L.Rev. 1, 11-13 (1975); Developments, supra, n. 10, 96 Harv.L.Rev. 1286, 1348.

immigrant workers entering the labor market,"[17] these goals are furthered by a policy requiring reinstatement of undocumented workers like the discriminatees herein. Undocumented workers are attractive to unscrupulous employers even when legal alternatives like guestworkers are available, precisely because they are undocumented and thus vulnerable to exploitation and more likely to endure substandard wages and working conditions.[18]

17/ Sen. Rep. No. 748, 89th Cong., 1st Sess., 1965 U.S. Code Cong. & Adm. News 3328, 3329.

18/ See, e.g., Comment: "Illegal Entrants: The Wetback Problem in American Farm Labor," 2 U.C. Davis L.Rev. 55, 59 (1970); Comment: Employer Sanctions, supra, n. 10, 1975 Ariz. St. L.J. 439, 457; Goodpaster, supra, n. 10, 1979 Ariz. St. L.J. 651, 669; Fogel, supra, n. 10, 15 San Diego L.Rev. 63, 66, 70-71; Lopez, supra, n. 11, 28 U.C.L.A. L.Rev. 615, 629, 667; Developments, supra, n. 10, 96 Harv. L.Rev. 1286, 1437; U.S. Comptroller General: "Illegal Aliens: Estimating Their Impact on the U.S.," U.S. General Accounting Office (1980) (hereinafter "G.A.O. Report") at 9-18; Note: "Retaliatory Reporting of Illegal Alien

(footnote continued)

Because "[a] primary factor in achieving adequate wages in this country has been the effect of unions," Ozbirman v. Regional Manpower Administrator, supra, 335 F.Supp. 467, 472, organization of undocumented workers into unions will decrease their attractiveness vis-a-vis domestic workers and mitigate or eliminate any adverse consequences their presence may have on the domestic labor force.[19/] Undocumented workers will be unlikely to join unions unless the full panoply of remedies

---

Footnote 18/ continued

Employers: Remedying the Labor-Immigration Conflict," 80 Colum.L.Rev. 1296, 1299 (1980). For a very early discription of the situation, see Hadley: "A Critical Analysis of the Wetback Problem," 21 Law & Contemporary Problems 334 (1956).

19/ In Kutchins & Tweedy: "No Two Ways About It; Employer Sanctions v. Labor Law Protections for Undocumented Workers," 5 Indust. Relations L.J. 339, 343-44 (1983), reference is made to a study which found, not surprisingly, that the 16% of undocumented workers who belonged to unions earned more and had better working conditions than their non-unionized fellows.

available under the NLRA, including reinstatement, is available to them.

Finally, reinstatement of wrongfully discharged workers, documented or not, will not be a major factor in encouraging undocumented immigration. That phenomenon already exists, fueled by socio-economic factors,[20] by the willingness of employers like Sure-Tan to hire undocumented workers, and probably by the de facto policies of Congress and the Immigration & Naturalization Service.[21] Remedying clear violations

---

20/ Those factors usually cited are the "push" of poor economic conditions in Mexico plus the "pull" of jobs in the U.S., and/or the existence of a "secondary labor market" in the U.S. comprising jobs which domestic workers refuse to perform. See, e.g., G.A.O. Report, supra, n. 18, at 10; Developments, supra, n. 10, 96 Harv.L.Rev. 1286, 1438 et seq. The proximity of the U.S. and Mexico and their historical interconnection is also relevant.

21/ The thesis is that our actual immigration policy has been to encourage undocumented workers to accept jobs in the U.S., as evidenced by failure to enact employer sanctions legislation, sporadic

(footnote continued)

of national labor policy by reinstating the instant discriminatees will have little effect on the nation's immigration problems, but failure to fully remedy the blatant unfair labor practice committed by Sure-Tan will certainly have a detrimental effect on national labor policy.

C. The Southern Steamship Holding Is Not Inconsistent With Reinstatement of Undocumented Workers.

Amicus agrees with the Employer that Southern Steamship Co. v. NLRB, 316 U.S. 31 (1942) requires the Board to consider national policies other than those embodied in the NLRA. The Board did so when it ordered reinstatement of the discriminatees

Footnote 21/ continued

enforcement of the immigration law, and underfunding of the Border Patrol. See generally, Hadley, supra, n. 18; Lopez, supra, n. 11; Developments, supra, n. 10, 96 Harv.L.Rev. 1286, 1440. This Court has also recognized the theory. Plyler v. Doe, supra, 457 U.S. 202, 218-219.

herein, which, as both the Board and the Ninth Circuit recognize, will further the goals of the INA insofar as it will deter employment of undocumented workers.[22/] The factual holding of Southern Steamship, that strikers who had engaged in criminal activity which harmed their employer should not be reinstated, is consistent with long-standing Board policy, as discussed supra at p. 7, and is not applicable in this case.

22/ NLRB v. Apollo Tire Co., supra, 604 F.2d 1180, 1183; 246 N.L.R.B. 788. Indeed, one might surmise that John and Steve Surak, owners of the Employer, hired the discriminatees because they were aliens, if not because they were undocumented, and thus vulnerable. During a previous organizing campaign at the Employer's predecessor, also owned and operated by the Suraks, John commented, when told that his Mexican employees were signing union cards: "A Mexican boy should know better because I can get a new Mexican every day." Surak and Surak, d/b/a Nat'l. Rawhide Mfg. Co., 202 N.L.R.B. 893, 894 (1973).

II. THE UNDOCUMENTED DISCRIMINATEES WERE CORRECTLY AWARDED BACK PAY.

The Board originally awarded back pay to the unlawfully discharged undocumented workers in this case, leaving computation of the precise amount to a compliance proceeding.[23/] The Court of Appeals modified the order so as to award back pay for a minimum six month period or longer if the discriminatees were "lawfully available" for employment, which the Court apparently intended to mean legally in the U.S. and/or authorized to work. The Court of Appeals and the Board assumed, apparently, that back pay should be tolled while discriminatees are out of the country.[24/] The Board

---

23/ 234 N.L.R.B. 1187 (1978); 246 N.L.R.B. 788 (1979) (denying General Counsel's Motion for Reconsideration).

24/ N.L.R.B. v. Sure-Tan, Inc., supra, 672 F.2d 592, 605-06; Order and Judgment of Court of Appeals, entered July 12, 1982, App. 25a.

accepted the Court's modification in this case, but did not purport to "articulate a general remedial policy for such cases."[25/] The Employer disputes the propriety of any back pay award and contends that such an award would encourage illegal immigration. Pet. Brief at 19-24.

Amicus contends that a back pay award was within the Board's authority and not inconsistent with the INA. Amicus also believes that the Seventh Circuit opinion in this case should be upheld, given the length of time which has expired and the concomitant difficulty of locating the discriminatees.[26/] However, amicus agrees with the Board that such matters as the amount of time a discriminatee would have worked

25/ N.L.R.B. Brief Opp. Cert. 8, n. 8.

26/ The specific reasons why the Seventh Circuit order is reasonable are detailed in the brief of proposed amici Mexican-American Legal Defense and Education Fund and National Lawyers Guild and will not be repeated here.

and his actual availability for work are more appropriately determined in compliance proceedings.[27] Amicus does not agree, however, that back pay should automatically be tolled while discriminatees are out of the country.

A. Back Pay Should Generally Be Awarded.

This Court has held on several occasions that back pay will be awarded wrongfully discharged discriminatees, absent exceptional circumstances. "Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces." Phelps Dodge, Inc. v. NLRB, supra, 313 U.S. 177, 197.

---

[27] As discussed in n. 7, supra, even though the Board did not cross-petition for certiorari, this Court has jurisdiction to decide whether the Court of Appeals exceeded its limited scope of review by modifying the Board's initial remedial order.

The purpose of a back pay award is not only to deter future violations of the Act. Back pay is also a remedy designed to restore, so far as possible, the status quo that would have obtained but for the wrongful act. NLRB v. Rex-Rutter Mfg. Co., 396 U.S. 258, 265 (1969), reh. denied, 397 U.S. 929 (1970). The discriminatees in this case would have continued to work had they not been discharged due to an unfair labor practice, and they should be made whole by a back pay award. Such an award is not punitive—merely remedial. The six months back pay ordered herein is not a "fine" against the employer for hiring undocumented aliens. It is, rather, compensation to the victims of an unfair labor practice.[28/]

28/ The fact that the amount of back pay is more than a fine would be is irrelevant. The back pay award in Rex-Rutter was $160,000. 396 U.S. 258, 261.

B. An Award of Back Pay Is Consistent With the INA.

Nor would a back pay award undermine the INA. To the contrary, as argued supra in connection with reinstatement, awarding back pay will discourage employers from hiring undocumented workers insofar as such awards will remove some potential for exploitation. If back pay is not awarded, employers will be able to hire undocumenteds and call INS at the first sign of union activity, secure in the knowledge that the maximum penalty will be a cease and desist order.

The function served by a back pay award has been recognized by the Board in several analogous cases involving underage employees.[29/] In most cases, the employer

29/ Laredo Packing, 241 N.L.R.B. 184 (1979); New Foodland, Inc., 205 N.L.R.B. 418 (1973); El Paso Manor, Inc., 159 N.L.R.B. 1649 (1966); The Embers of Jacksonville, Inc., 157 N.L.R.B. 627 (1966). The only exception has been when the employee lied about her age. Justrite Mfg. Co., 238 N.L.R.B. 52 (1978).

knew the employees were underage but used that fact as a pretext for discharging them after a union organizing campaign had begun. In all such cases, back pay was awarded from date of discharge to date of reinstatement, including the period when the employee was underage, the theory being that otherwise employers would be encouraged to violate the child labor laws.

Similar rulings have been made by state courts, which have permitted recovery of wages earned by but not paid to undocumented persons. The rationale for these rulings was explained by the Alaska Supreme Court as follows:

> "[S]ince the purpose of [section 212(a)(14) of the INA] would appear to be the safeguarding of American labor..., the [employee's] contract should be enforced because such an objective would not be furthered by permitting employers knowingly to employ excludable aliens and then, with impunity, to refuse to pay them for their services."

Gates v. Rivers, Alaska Spr. Ct., 515 P.2d

1020, 1022 (1973).[30] These comments are applicable to Sure-Tan.

C. Back Pay Issues Are Best Determined In Compliance Proceedings.

Given the six years which have elapsed since the discharge and the difficulty of reconstructing Sure-Tan's business history and the discriminatees' work histories since then, the Court of Appeals acted correctly in awarding six months back pay.[31] Amicus

30/ Cf. Peterson v. Neme, 222 Va. 477, 281 S.E.2d 869, 872 (1981) (undocumented alien permitted to recover lost wages as element of tort damages, even though she lacked work authorization); Arteaga v. Literski, 83 Wis.2d 128, 265 N.W.2d 148, 150 (1978) (undocumented aliens may sue landlord in tort, since otherwise landlords would be encouraged to rent to undocumented).

31/ The difficulty is compounded by the fact that the discriminatees are apparently unable to be located. It is not clear from the record whether the Board had an opportunity to obtain current addresses and other information in light of their hasty departure. NLRB Case Handling Manual Section 10269. In this context, it might be noted that the Southern Steamship rule that federal agencies should accomodate

(footnote continued)

would urge, however, that such issues are best determined in compliance proceedings, where evidence can be taken as to the seasonal or nonseasonal nature of the business, employee turnover, and the length of the employee's stay in the United States.

D. Back Pay Should Not Be Tolled While Discriminatees Are Not in the U.S.

Generally, back pay is tolled during periods when a claimant is unavailable for work, out of the labor market, or not

Footnote 31/ continued

other federal agencies applies to the INS as well as to the Board. There seems to be no reason why the INS could not have delayed departure of the discriminatees until after the unfair labor practice proceeding or at least until the discriminatees were deposed, especially given its willingness to exercise "prosecutorial discretion" to refrain from deporting deportable aliens in other situations. See Roberts: "The Exercise of Administrative Discretion Under the Immigration Laws," 13 San Diego L.Rev. 144 (1975); Wildes: "The Operating Instructions of the I.N.S.--Internal Guides or Binding Rules," 17 San Diego L.Rev. 99 (1979); Plyler v. Doe, supra, 457 U.S. 202, 226.

seeking work. Phelps Dodge Corp. v. NLRB, supra, 313 U.S. 177, 197-99. Unavailability is defined quite narrowly, however, as limited to being ill, institutionalized, or in jail. NLRB Case Handling Manual Sec.10612. The Board has held that absence from the country does not necessarily constitute unavailability, at least while the alien is working abroad. In M Restaurants, Inc., d/b/a The Mandarin, 238 N.L.R.B. 1575 (1978), enforced 621 F.2d 336 (9th Cir. 1980), a discriminatorily discharged worker returned to Taiwan after he was unable to find employment in California. The Board awarded back pay for that period, less his earnings in Taiwan, commenting:

> "The Board will not permit a wrongdoer to evade liability to a discriminatee who has left the local job market to secure employment... and lessen his expenses when he has been unable to find employment in the area of his unlawful discharge." 32/

32/ See following page for footnote.

Even if the discriminatees are not considered available while in Mexico, however, they should be awarded back pay pursuant to another longstanding Board policy, that back pay is awarded even for periods of unavailability when the employer caused the unavailability. In Graves Trucking, Inc., 246 N.L.R.B. 344 (1979), for example, the Board awarded back pay for a period when an employee was injured and unable to work, because the injury was inflicted by the employer. The Board commented that such an award was "not reparation" but rather "the only way to restore [the employee] as nearly as possible to the economic position he would have obtained, but for [the employer's] unlawful conduct." 246 N.L.R.B. 344, 345. The Board similarly

32/ (from previous page)
238 N.L.R.B 1575, 1577. This ruling is consistent with longstanding Board policy. Gary Aircraft Co., 210 N.L.R.B. 555, 557 (1974); Champa Linen Service, 222 N.L.R.B. 940 (1975); International Trailer Co., 150 N.L.R.B. 1205, 1213 (1965).

awards back pay for periods when an employee is disabled because of an industrial accident in a second job. American Manufacturing Company of Texas, 167 N.L.R.B. 520, 522 (1967). It is Sure-Tan which has caused the instant discriminatees to be absent from the labor market, and thus the burden of compensating them should fall on the company.[33/]

Of course, the employees should be required to seek work while in Mexico. Their interim earnings may be low, but the facts of this case fit within Board doctrine justifying low interim earnings under special circumstances, for example when unemployment is high, the employee belongs to a disadvantaged group, or the employee has been blackballed.[34/]

33/ This argument is made in Note: Retaliatory Reporting, supra, n. 18, 80 Columbia L.Rev. 1296, 1311-15.

34/ NLRB Case Handling Manual Sec.10616.3;
(footnote continued)

Finally, back pay need not accrue indefinitely, but rather could terminate according to usual rules, e.g., when the employee finds equivalent work or when he would have been laid off or quit. This date can be determined in a compliance proceeding.

E. Discriminatees Should Not Be Denied Back Pay for Periods When They are Physically Present in the U.S.

The court apparently ruled that back pay should not be awarded unless discriminatees are legally in the U.S. and authorized to work.[35] This is inconsistent with

Footnote 34/ continued

M Restaurants, Inc., supra; Moss Planning Mill Co., 116 N.L.R.B. 68, 70 (1956); NLRB v. Pugh & Barr, Inc., 231 F.2d 558, 559 (4th Cir. 1956).

35/ The Court's order of July 12, 1982, refers to "lawful availability." App. 28a. The Court appeared to assume, however, that interim earnings accrued during such a period would be deducted from the back pay award.

Board policy which awards back pay for periods when a discriminatee is under a legal disability, provided that the employer knew of the disability and would have continued to employ the worker, notwithstanding the disability. The Board followed this procedure in the underage worker cases cited supra, n. 29, as well as in Operating Engineers Local 57 (M.A. Gammino Construction Co.), 108 N.L.R.B. 1225, 1227-28 (1954), where back pay was awarded for a period when an operating engineer did not have a valid state license, and Robinson Freight Lines, 129 N.L.R.B. 1040, 1042, 1047-48 (1960), where back pay was awarded to a truck driver who did not have a valid chauffers license. The rationale of these cases is that the award is necessary to make the employee whole, as s/he would have continued to be employed, even though under a legal disability, but for the unfair labor practice. That rationale is applicable to this case.

The discriminatees would have been employed, despite their immigration status, but for the unfair labor practice, and they should be compensated for their lost wages.

III. THE REINSTATEMENT OFFER WAS PROPERLY ORDERED.

The Employer also challenges the specific requirements of the reinstatement offer ordered by the court.[36/] The order was properly tailored to the facts of this case.[37/]

Contrary to the Employer's contention, the Board does on occasion require a reinstatement offer to be kept open until the discriminatee is able to accept it, even if for a considerable period of time. Usually this occurs when a discriminatee is in the

---

36/ 672 F.2d 592, 606.

37/ NLRB Case Handling Manual Sec. 10528 requires that reinstatement offers be varied according to the circumstances of the particular case.

army, in which case he is offered employment to be accepted within a reasonable period of time after release.[38] While the exact time when discriminatees would have been available might have been better left to a compliance proceeding, four years seems reasonable.[39]

Similarly, the court acted within its discretion in requiring the reinstatement offers to be sent to Mexico and that receipt be verified. It is the employer who chose to hire Mexican nationals rather than Illinois natives and it is not unfair to put the burden of contacting them on that

38/ NLRB Case Handling Manual Sec. 10528.1. NLRB v. Revlon Products Corp., 144 F.2d 88 (2d Cir. 1944).

39/ One cannot infer that, because the employees chose voluntary departure, they were deportable. The INS has been criticized for coercing voluntary departure without first informing aliens of their rights. Developments, supra, n. 10, 96 Harv.L.Rev. 1286, 1389-90; U.S. Commission on Civil Rights: "The Tarnished Golden Door: Civil Rights Issues in Immigration" at 97, 101 (1980).

employer. Moreover, it is the employer who caused the employees to relocate to Mexico.[40/] It is settled that difficulty in locating former employees is not an excuse for failing to offer them reinstatement. As the court noted in American Machinery Corp. v. NLRB, 424 F.2d 1321, 1328 (5th Cir. 1970), "A concerned employer will find the means to cope with this burden."

Finally, the court properly ordered that the notice be in Spanish. The Employer chose to hire employees who spoke little or no English and there is evidence that he communicated with them to some extent in Spanish. 234 N.L.R.B. 1187, 1190. Obviously, the reinstatement offer will be meaningless if the employees to whom it is directed are unable to understand it.

40/ There is evidence that the Employer made a practice of hiring Mexican nationals as long ago as 1971. Surak and Surak d/b/a/ Nat'l. Rawhide Mfg. Co., supra, 202 N.L.R.B. 893, 894.

Both Congress and the California Legislature have recognized that many non-English speaking persons live in this country and that, to be effective, communication must be in their native languages. The federal Voting Rights Act, for example, requires state and local political subdivisions to provide bilingual voting materials in any area where five percent or more of the population speak a language other than English. 42 U.S.C. Sec. 1973aa-1a(b). This Court has interpreted Title VI of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000d, to require the provision of services in languages other than English, if necessary to effectively serve non-English speaking recipients of federal funds. Lau v. Nichols, 414 U.S. 563 (1974). The U.S. Department of Justice has similarly interpreted Title VI. 28 C.F.R. Sec.42.405(d).

Many southwestern states, which were once part of Mexico and have long had

substantial numbers of non-English speaking residents, have been even more solicitous of their non-English speaking citizens. As the California Supreme Court observed in Castro v. California, 2 Cal.3d 223, 243 (1970), in striking down a section of the State Constitution which restricted the franchise to citizens literate in English:

> "[I]t would indeed be ironic that petitioners, who are the heirs of a great and gracious culture, identified with the birth of California and contributing in no small measure to its growth, should be disenfranchised in their ancestral land, despite their capacity to cast an informed vote."

Recognizing that many citizens and permanent residents live in the state, the California Legislature has required that services be provided in Spanish in a variety of areas. The Dymally-Alatoree Bilingual Services Act, Calif. Gov't. Code Sec. 7290, et seq., for example, requires state and local governmental agencies to

provide services in languages other than English. In enacting this law, the Legislature found: "The Legislature further finds and declares that substantial numbers of persons who live, work and pay taxes in this state are unable, either because they do not speak or write English at all, or because their primary language is other than English, effectively to communicate with their government." Calif. Gov't. Code Sec. 7291. The Legislature has also required the State Department of Motor Vehicles to furnish Spanish language versions of the motor vehicle laws, Calif. Vehicle Code Sec. 1656(b), and the agency which administers the unemployment insurance program to furnish informational pamphlets in Spanish. Calif. Unemployment Insurance Code Sec. 316.

Nor has the duty to provide non-English material been limited to state agencies. California Civil Code Sec. 1632 requires businesses to provide Spanish language

contracts to consumers when the negotiations have been primarily in that language. The Ninth Circuit has ruled that the duty extends to unions as well. Retana v. Hotel Workers Local 14, 453 F.2d 1018, 1024 (9th Cir. 1972) held that it could be a breach of the duty of fair representation for a certified collective bargaining agent to fail to provide copies of the collective bargaining agreement and other assistance in Spanish to its many monolingual Spanish members. The Court's observations are applicable to Sure-Tan:

> "It is not difficult to conceive a set of facts...in which a minority group of union members were effectively deprived of an opportunity to participate either in the negotiation of the collective bargaining agreement or in the enjoyment of its benefits by a language barrier which union officials exploited or took no steps to overcome."

The Board and the Court of Appeals acted well within their authority in ordering Spanish language notices by Sure-Tan

to preclude further exploitation of the discriminatees herein.

CONCLUSION

Amicus urges this Court to affirm the ruling of the Court of Appeals, except insofar as it automatically tolled accrual of back pay while discriminatees were absent from the U.S. Amicus also urges this Court to suggest to the Board that in the future reinstatement and back pay issues be determined in compliance proceedings. In no event should the harm done to the discriminatees be left unremedied, keeping in mind the admonition of a judge of the Court of Appeals which covers much of the Southwest:

> "If the NLRA were inapplicable to workers who are illegal aliens we would leave helpless the very persons who most need protection from exploitative employer practices such as occurred in this case."

NLRB V. Apollo Tire Co., supra, 604 F.2d

1180, 1184 (Kennedy, J., concurring).

Dated: September , 1983.

Respectfully submitted,

MARY K. GILLESPIE
Counsel for Amicus Curiae
California Rural Legal
Assistance Foundation